

Appl. No. 10/725,251
Docket No. P146
Amdt. dated September 17, 2010
Reply to Office Action mailed on June 17, 2010
Customer No. 27752

REMARKS

Claim Status

Claims 1-3 and 6-20 are pending in the present application.

Claims 9-20 were previously withdrawn as a result of an earlier restriction requirement.

With this Response, independent claim 1 has been amended. No new matter has been added. Consequently, entry of this amendment is respectfully requested.

Rejection Under 35 USC §112, Second Paragraph

The Office Action states that amended claims 1-3 and 6-8 are rejected under 35 USC 112, second paragraph, as being indefinite for reasons of record on page 2 of the Office Action. Applicants have amended independent claim 1 to now recite crude protein, which support can be found on page 5 of the specification as filed. Reconsideration and withdrawal of the rejection are respectfully requested.

Rejection Under 35 U.S.C. § 102 Over Flickinger

Claims 1 and 6-8 have been rejected under 35 U.S.C. § 102 (a) as being anticipated by Flickinger. Applicants respectfully traverse this rejection. However, in order to advance prosecution, and without conceding to the basis of the rejection, Applicants have amended independent claim 1. Reconsideration and withdrawal of the rejection are respectfully requested in view of amended independent claim 1.

Independent claim 1 now recites, inter alia, a companion animal composition comprising from about 0.01% to 0.19% added short chain oligofructose, by weight of the composition. Thus, as now amended, the short chain oligofructose is added to the composition such that this amount is additional to whatever amounts may be present from other sources.

The Office Action points to Table 1 of Flickinger for the disclosure of 15.46% wheat and relates that to the disclosure on page 2017, left column, second full paragraph, where Flickinger discloses that the first study contained approximately 15% wheat grain, which contains an average of 1.4 mg/g of scFOS. Flickinger goes on to state that, calculated, this could contribute 0.21 mg of scFOS/g of diet, or about 0.02% dietary scFOS in addition to the supplemented levels of OF.

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As now amended, independent claim 1 recites added short chain oligofructose. However, as described, the short chain oligofructose of Flickinger is inherent and present by way of the wheat ingredient. Accordingly, Applicants submit that Flickinger fails to at least disclose a composition comprising from about 0.01% to 0.19% added short chain oligofructose, by weight of the composition. Thus, for at least this reason, Flickinger fails to disclose each and every element of the claims, and Applicants respectfully request reconsideration and withdrawal of the rejection.

Additionally, independent claim 1 has been amended to recite specific fiber sources. The fiber source is selected from the group consisting of beet pulp (from sugar beet), gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide additional to the short chain oligofructose, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof. As best understood by Applications, Flickinger is silent regarding these additional fiber sources. Thus, for at least this additional reason, Flickinger fails to disclose each and every element of the claims, and Applicants respectfully request reconsideration and withdrawal of the rejection.

Rejection Under 35 U.S.C. § 103 Over Flickinger

Claims 1 and 6-8 have been rejected under 35 U.S.C. § 103 as being unpatentable over Flickinger. Applicants respectfully traverse this rejection. However, in order to advance prosecution, and without conceding to the basis of the rejection, Applicants have amended independent claim 1. Reconsideration and withdrawal of the rejection are respectfully requested in view of amended independent claim 1.

Independent claim 1 now recites, inter alia, a companion animal composition comprising from about 0.01% to 0.19% added short chain oligofructose, by weight of the composition. Thus, as now amended, the short chain oligofructose is added to the composition such that this amount is additional to whatever amounts may be present from other sources. Further, independent claim 1 has been amended to recite that the composition is nutritionally balanced. Additionally, independent claim 1 has been amended to recite specific fiber sources. The fiber source is selected from the group consisting of beet pulp (from sugar beet), gum arabic, gum talha, psyllium, rice bran,

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carob bean gum, citrus pulp, pectin, fructooligosaccharide additional to the short chain oligofructose, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

For the following reasons, based on these three amendments, Applicants submit that the rejection under 35 U.S.C. § 103 should be withdrawn.

The Office Action points to Table 2 and page 2010, right column, of Flickinger for the disclosure of 0, 0.5, 1, or 1.5 g scFOS in 250 g of kibbled diet. Firstly, Applicants want to point out that for this experiment of Flickinger, the scFOS was administered orally by gelatin capsule. See third full paragraph, right column, page 2010. Additionally, Flickinger states that this administration orally by gelatin capsule was done in order to avoid the possibility of scFOS degradation during diet processing. Accordingly, it is submitted that this disclosure of Flickinger does not relate to a nutritionally balanced companion animal composition that is a dog food or a cat food as recited in claim 1.

Indeed, the disclosure of Flickinger related to administration orally by gelatin capsule in order to avoid the possibility of scFOS degradation during diet processing is a very specific teaching away from the claims of the present application. Flickinger is specifically stating that the gelatin capsule were used to avoid adding to a diet because of degradation during diet processing. This disclosure represents a clear and unmistakable teaching away from the claims of the present application.

According to MEP 2141.02 VI., a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. W.L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). And, according to MPEP 2145 D. 1., a prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness..." Here, Flickinger specifically teaches away from a diet, which is typically construed as a nutritionally balanced companion animal composition. Accordingly, Applicants respectfully submit that based on this clear teaching away, Flickinger cannot be used to support a proper rejection under 35 U.S.C. § 103.

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Additionally, independent claim 1 has been amended to recite specific fiber sources. The fiber source is selected from the group consisting of beet pulp (from sugar beet), gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide additional to the short chain oligofructose, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof. As best understood by Applications, Flickinger is silent regarding these additional fiber sources. Thus, for at least this additional reason, Flickinger cannot be used to support a proper rejection under 35 U.S.C. § 103.

Thus, since Flickinger teaches away from the claims of the present application and fails to disclose each and every element of the claims, it cannot said to obviate the claims. Applicants respectfully request reconsideration and withdrawal of the rejection.

CONCLUSION

This Response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied references. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims are respectfully requested.

Respectfully submitted,

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